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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 84

OBED M. LASSEN, COMMISSIONER,
STATE LAND DEPARTMENT,

Petitioner,

vs.

THE STATE OF ARIZONA, EX REL.
ARIZONA HIGHWAY DEPARTMENT

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

The decision under review arose as an original Writ of Prohibition in the Arizona Supreme Court to test the validity of Rule 12 of the State Land Department, which purported to require specific payment to be made for all rights of way and material sites used by the State of Arizona and its various Counties for highway construction purposes.[1]

Since there was no trial, and since no evidence relative to Rule 12 was adduced at the hearing held in connection with the promulgation of that Rule, there is no record in this case except for a few formal legal documents. The relevant facts are therefore limited to those which appear on the face of the motions and other papers which have been filed, and those of which the Court may take judicial notice. The nature and

[1]Rule 12 is set forth at pages 11-12 of the Transcript of Record.

extent of those facts will be discussed in the body of the argument.

STATUTE INVOLVED

It is the Respondent's view that the following provisions of Section 28 of the Arizona Enabling Act lie at the heart of the issues in this case:

> "Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered. . . .
>
> "All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . .
>
> "Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void. . . ."

QUESTIONS PRESENTED

1. Whether this Court should reject a finding of fact by the Arizona Supreme Court where there is no evidence on the record inconsistent with such finding.

2. Whether the Arizona Supreme Court, in interpreting and implementing the provision of the Arizona Enabling Act that trust lands not be disposed of except for value, should be allowed to consider value return from the standpoint of all

trust lands and not just isolated parcels or sections.

SUMMARY OF ARGUMENT

The Arizona Enabling Act prohibits the disposal of certain lands held in trust "for a consideration less than [their] value. . .".

For more than 50 years, the Arizona State Highway Department has been using State lands for the construction of highways without paying specific dollar compensation for each parcel taken. From 1938 down to the present, the Arizona Supreme Court has, on three separate occasions, held that this practice does not violate the value requirements of the Arizona Enabling Act. These decisions have all been based upon the Court's determination that as a matter of fact the construction of highways across trust lands in the State of Arizona does not diminish the value of those lands. There is no evidence on this record that that factual holding is incorrect.

If the Petitioner is to succeed in upsetting the lower Court's holding, he must either:

1. Overturn the Court's holding that, in fact, the construction of highways across sections of trust lands in Arizona does not decrease the value of those lands as a whole.

2. Show that the Arizona Court was wrong in holding that the value requirements of Arizona's Enabling Act permit a determination of the value return to all trust lands considered as a whole, and not just the particular parcels used for highway purposes.

The first of these alternatives might have been accomplished at one stage of the litigation, but certainly not before this Court. A proceeding before the United States Supreme Court is two stages too late to start introducing evidence.

As to the second issue, the Arizona Enabling Act creates in the State broad leeway in interpreting and administering the trust land provisions of the Act. There is also implicit in the holdings of this Court the doctrine that an interpretation placed

upon an enabling act by the state involved will be upheld unless unreasonable. Such a doctrine is particularly appropriate where the relevant provision deals with matters which substantively are within the scope of exclusive state responsibility, such as schools, hospitals, reformatories, etc.

The United States agrees that value enhancement to trust lands directly attributable to highway construction must be offset against the value of land taken for highway purposes. The United States would apparently permit the offset, however, only on a section by section or project by project basis. Such a restriction is repugnant to the principle—with which the United States agrees—that it is the net effect of a public use on the value of the trust which must be considered. It is no more tenable to limit the consideration of value return to the trust to particular projects or to arbitrary section lines, as the United States seems to suggest, than to adopt the Petitioner's contention that only the lands actually used for highway purposes should be considered.

The Arizona Supreme Court's interpretation in this case is supported by the holdings of other courts and by the position taken over the years by the United States Department of Justice —the federal agency charged with the enforcement of this federal statute. It is also supported by studies which have been conducted in other states as to the effect of highways upon the values of nearby lands, and by the role which historians have assigned to highways in developing the State of Arizona and enhancing the value of its lands.

ARGUMENT

I. *The Holding of the Lower Court Rests Upon a Factual Foundation Which May Not be Rejected by Fiat, as the Petitioner Attempts to Do.*

Notwithstanding any implications in the Petitioner's Brief, neither the Arizona Supreme Court nor any of the agencies of

this State has ever suggested that trust lands could be given away, or disposed of in any way so that the trust fund is diminished. The issue in this case is not whether the State of Arizona may ignore the requirements of its Enabling Act dealing with trust lands. This the Arizona Supreme Court has never done nor purported to do; on numerous occasions it has reaffirmed its recognition that all State law and policy must conform to those requirements. See *e.g. Murphy v. State*, 65 Ariz. 338, 181 P.2d 336 (1947); *Boice v. Campbell*, 30 Ariz. 424, 248 Pac. 34 (1926).[2]

The issue is, rather, whether the State of Arizona—in carrying out its statutory responsibility of enforcing the trust land provisions of its own Enabling Act—may, within reasonably circumscribed bounds, interpret and implement such terms as "no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . ."

There are various means by which parcels of these trust lands could be used or disposed of so as to preserve or enhance the "value" of the fund represented by the lands and their proceeds. One such means would be to charge specific prices for every piece of land sold, leased, or encumbered, no matter how small and regardless of the effect which utilization of the parcel taken might have on the value of remaining lands. But this is not by any means the only method—nor is it necessarily the most effective—by which that end may be accomplished.[3]

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[2]The sole relevance of the amendment of the Enabling Act to permit 640 acres to be given to the town of Benson is that this amendment bears out Arizona's vigilance in enforcing both the letter and the spirit of its Enabling Act, and requiring cash payment where cash payment is required by the Act. The disposition of an entire section would obviously result in a value decrement to the trust since there would be no remaining surrounding trust lands, and other trust lands throughout the State would hardly benefit from the construction of a park in Benson.

[3]Consider, for example, the possible situation in which the United States is considering the construction of a new atomic energy facility

Since the issue was first raised in *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031 (1938), the Courts of the State of Arizona have taken the broad view as to the meaning of the value requirement of the Arizona Enabling Act. Under that view, utilization of trust lands for public use is permissible if the increase in value to the remaining trust lands resulting directly from such public use is equal to or greater than the actual value of the land taken. This was the holding of *Grossetta v. Choate, supra,* and *State of Arizona ex rel Conway v. State Land Department,* 62 Ariz. 248, 156 P.2d 901 (1945).

Grossetta v. Choate and *State v. State Land Department* also held that in fact the grant of rights of way and material sites over trust lands results in an overall value increase to such lands, notwithstanding the unavailability to the trust of that portion of the land over which the highways were constructed. The value increment to remaining lands more than offsetting the value of lands taken, the value requirements of the Enabling Act were held satisfied.[4]

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and needs forty acres for that purpose. One of the possible sites is located near the center of one of the sections reserved by the Enabling Act for the support of the common schools in the State of Arizona; others are located on privately owned lands in other parts of the State or outside of the State. Assume that the State Legislature has concluded that the value of the remaining school lands in the section would quadruple if the atomic energy facility were located on the proposed trust land site. It would hardly serve the Enabling Act's basic purpose of value enhancement to hold that that Act forecloses the State from offering a free site for such a facility within the school land section as an inducement for construction of the improvement there.

The total context of the instant controversy does not present the problem so starkly as the foregoing hypothetical, but the two cases are inextricably bound up in the same legal package. The only issue of law in this case is one which necessarily resolves the hypothetical. That issue is: where the State of Arizona—acting through appropriate departments of its government—concludes that the value of the trust would be either preserved or enhanced by utilizing designated parcels of trust lands in a particular way other than exchanging such lands for cash, is the Enabling Act to be so narrowly construed as to prohibit it from doing so.

In the instant case no evidence was presented at the hearing in connection with the promulgation of Rule 12 to contradict the continuing validity of these earlier factual determinations. Under such circumstances, the Arizona Court simply declined to overturn its holdings in the two prior cases that as a matter of fact the construction of highways across trust lands in Arizona results in a net value enhancement to these trust lands.

The Petitioner's brief is replete with statements and implications that the trust established by Congress is being dissipated because of the Arizona Court's holding. The sole support for these statements is their repeated assertion in the Petitioner's brief. An attempt to upset factual determinations of the highest court of the State of Arizona stretching over a period of 25 years must rest upon a more firm foundation than the Petitioner's own rhetoric.

At the time that the Petitioner adopted the rule which gave rise to this litigation, he was of course aware of the two holdings of the Arizona Supreme Court handed down in 1938 and 1945. He was also aware of the factual underpinnings of those cases. If the Petitioner feels that the factual foundation of those cases was wrong, the time and place to have presented evidence to that effect were available: the proceeding in the Land Department itself in which the Department's Rule No. 12 was promulgated. Instead, the Land Department elected to wait until a Writ of Prohibition was brought against the enforcement of this rule, and then simply rely—as it does here—upon a conclusionary assertion that the Arizona Supreme Court was wrong.

Implicit in the Petitioner's repeated factual assertions is a recognition that if the Arizona Court's determination is to be

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[4]In *State v. State Land Department*, the Court held that ". . . the natural tendency of the grant [of a right of way for a public road] across such lands . . . is to enhance rather than to lessen their salable or rentable value." 62 Ariz. at 254.

upset, there must be evidence that the foundation of that decision is faulty. We agree. But the appellate stage of a lawsuit is too late for the parties to start introducing evidence.

The basic factual posture of the case makes it inappropriate for review by this Court. It is therefore respectfully submitted that the Writ of Certiorari should be dismissed as improvidently granted, and the legal issue left for another case whose procedural posture makes it a fit vehicle for consideration by this Court. *Cf. Hicks v. District of Columbia,* 383 U.S. 252, 86 S.Ct. 798 (1966).

II. *The Arizona Supreme Court's Interpretation of its Own Enabling Act is a Permissible One.*

Assuming *arguendo* that factual deficiencies could be cured by conclusionary assertions, the only legal issue in this case is whether the Arizona Supreme Court's interpretation of the Arizona Enabling Act is an interpretation which the Arizona Court is entitled to make. Three provisions—two restrictions and a savings clause—contained in Section 28 of the Enabling Act are crucial to the determination of that issue.

The first restriction is very specific, prohibiting sale or lease "except to the highest and best bidder at a public auction to be held at the County seat of the County wherein the lands to be affected, or the major portion thereof shall lie . . ."; precise details concerning the conduct of the auction are also set forth.[5] The other, more general restriction, requires simply that lands "shall be appraised at their true value and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . ."

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[5]Notice of the public auction must be given by advertisement ". . . published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered. . . ." Arizona Enabling Act, Section 28.

The savings clause appears toward the end of Section 28, and provides that "every sale, lease, conveyance, or contract . . . *not made in substantial conformity* with the provisions of this Act shall be null and void. . . ." (Emphasis added.)

A. *The Public Auction Requirement*

The evil which the trust provision scheme was primarily intended to prevent was the sacrifice of public lands for private gain, such as was involved in the "tall timber" cases which were chiefly responsible for the trust land restrictions. See S. Rep. No. ss 454, 61st Cong., 2d Sess. at 1920 (1910); 45 Cong. Rec. 8227.

Unquestionably, a requirement that lands not be disposed of except to the highest bidder at public auction is a most effective means of insuring against private exploitation of public lands. But the use of public lands by the public itself for highway purposes is an entirely different matter. Neither the Petitioner, nor the Respondent, nor the State of New Mexico, nor the United States, nor so far as we are aware, anyone else, would favor the disposition of lands to be used for highway material sites or rights of way to the highest bidder at a public auction which must be held in the county where the lands are located and advertised in two newspapers at least once each week for ten weeks prior to the auction date. Such a procedure would merely result in senseless delay and costs which would ultimately have to be borne by the public itself.

In our view, the public auction provisions do not apply to highway or other public uses because they were not intended so to apply, and because the substantial conformity provision saves them from such application.

The obvious purpose of the public auction provisions was to prevent private profiteering in public lands. In all likelihood, Congress simply did not consider the question whether the public auction provisions should apply to highway uses; had it so considered, it probably would have concluded—as all parties concerned now conclude—that they should not. Congress did recog-

nize very clearly, however, that it could not divine in 1910 all of the possible problems which would arise throughout the ensuing decades in which the Enabling Act would endure. Congress further recognized that if the Enabling Act's trust provisions were to be workable, sufficient elbow room must be allowed for the State to deal with particular problems not foreseen and specifically resolved by the Act itself. Consequently, it provided that only transactions *not made in substantial conformity* with the provisions of the Act should be null and void.

The inappropriateness of public auction to dispose of lands for public purposes bears out the wisdom of the Congressional judgment to allow the State leeway in implementing its own Act so long as in substantial conformity with the Act's provisions and without detriment to the trust.

The Petitioner has a different solution to the dilemma, but one that is clearly inconsistent with the language of the Act itself. The Petitioner suggests that trust lands may be acquired by the State by eminent domain notwithstanding the public auction provisions. This proposal must fall of its own weight. Eminent domain and public auction are two distinct and mutually exclusive means of acquiring land. If these lands must be disposed of only by public auction regardless of the purpose for which they are to be used, then they cannot be acquired by eminent domain.[6]

The issue which the Petitioner refuses to face—presumably

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[6]The Idaho Supreme Court in *Hollister v. State*, 9 Idaho 8, 71 Pac. 541 (1903), adopted the same reasoning urged here by the Petitioner. The Respondent agrees with the Montana Supreme Court that the Idaho decision ". . . simply amounts to a declaration that the Congress of the United States did not mean what it said when it commanded that sections 16 and 36 in every township should be sold at public sale." *State ex rel Galen v. District Court*, 42 Mont. 105, 112 Pac. 706, 708 (1910).

The Enabling Act for the States of North Dakota, South Dakota, Montana and Washington, Act of Feb. 22, 1889, Ch. 180, 25 Stat. 676, with which the *Galen* Court dealt, did not contain a substantial conformity provision.

because either answer is inimical to his position—is this: do the public auction provisions apply to lands used for highway purposes or do they not? If the answer is yes, then eminent domain is clearly precluded.

It is the Respondent's position that the public auction provisions do not apply to highway uses because Congress did not intend them to apply, and because Congress' failure specifically to except lands for highway uses from the public auction provisions—probably because Congress did not consider the matter —is saved by the substantial conformity provision.

The Petitioner would of course be reluctant to resolve this problem by relying on the substantial conformity provision of the Act because of the import of this discretion-creating provision to the interpretation of the broader and clearly applicable restriction contained in Section 28, namely, that value be obtained for lands disposed of. We turn now to a discussion of that value issue.

B. *The Value Requirement*

The Petitioner staunchly and repeatedly asserts that no disposition of trust lands may be made except in conformity with the provisions of the Act. On this point, we are in complete agreement. But the attempted leap from the conceded premise that the provisions of the Act must be complied with, to the proposition that cash or specific dollars must be paid for every parcel of ground disposed of, is not consistent with the Act itself.

Petitioner's assertions notwithstanding, the Arizona Enabling Act may be searched from one end to the other without finding the words "specific dollars", or "cash in hand". The legislative history of the Act is similarly devoid of any reference to "cash in hand", or "specific dollars". The requirement is rather that "no sale or other disposal thereof shall be made for a consideration less than the value. . . ." If the draftsmen of the trust provision had intended that the only remuneration for these lands were

to be specific dollars, they would have said so. Instead they chose a broader, more flexible requirement: that no disposition be made except for "value". Not "cash", but "value". As discussed above, further flexibility was provided by interdicting only those conveyances not made in substantial conformity with the provisions of the Act. Under the aegis of these two provisions, the holding of the Arizona Court that "value" in the present context contemplates value to remaining lands as well as lands taken is a determination which the State of Arizona, acting through its courts, is entitled to make. The permissibility of this interpretation is further supported by the following:

1. Interpretations which have been placed upon similar provisions appearing both in enabling acts and in state constitutions, by the courts of other states.

2. Interpretations which have been placed upon this particular enabling act by the governmental bodies charged with its enforcement.

3. The general principles—based upon comity and constitutional doctrine—which have been set forth by this Court pertaining to the discretion and leeway which should be allowed the individual states in interpreting and implementing their respective enabling acts.

4. Congressional judgment reflected in the absence of narrow restrictions on lands conveyed to the State of Alaska by the Alaska Admission Act.

1. *Decisions of Other States*

The decision chiefly relied upon by the Arizona Supreme Court in its *Grossetta v. Choate* and *State Land Department* decisions was *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433, 222 Pac. 3 (1924), on rehearing 31 Wyo. 464, 228 Pac. 642 (1924).[7] The Wyoming Enabling Act provides that certain lands be "selected and withdrawn from sale and located . . .

[7]The Petitioner represents that the *Ross* decision is now followed only as to certain kinds of lands. If true, this is irrelevant, since an election

for the use and support of a university," and that "none of said lands shall be sold for less than $10.00 per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said state and the income thereof be used exclusively for university purposes." The State Constitution further requires that the lands be disposed of only at public auction.

The Wyoming Supreme Court upheld the use of these lands for highway construction purposes on the same grounds as adopted by the Arizona Supreme Court. The following excerpts from the opinion are illustrative:

> "In acts of that kind we see a congressional recognition of public necessity of the improvements thus aided, and a purpose to enhance the value and hasten the settlement of the public lands affected."
>
> ....
>
> "[Public roads] are as necessary across public lands held by the state under these grants as they are across similar lands still held by the United States, *and their establishment is as likely to enhance the value of the former as the latter.*" 228 Pac. at 5-6. (Emphasis added.)[8]

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by the Wyoming highway authorities not to pursue a favorable decision is solely an internal Wyoming matter. Moreover, the representation itself is one of many self-serving assertions which pervade the Petitioner's brief and which are without support in the record.

[8]On rehearing, the Wyoming Supreme Court further elaborated upon the basis for its holding:

> "'The general provisions of the congressional granting acts and our state Constitution, limiting or conditioning the sale and disposal of the lands in question, should be reasonably construed, in view of the object of the grant, and the purpose of the restrictions. They contemplate, principally, so far as the question here is concerned, the creation and maintaining of a permanent fund, which, through proper investment, shall furnish an income to be used exclusively for University purposes, and incidentally, a fair sale at an adequate price. Unless such object or purpose is found to have become substantially impaired through granting a right of way for a county or public road, neither the act of the state making the grant nor the statute authorizing it should be held a violation of the trust upon which the land is held, or of the constitutional restrictions upon its disposal. *For the natural tendency*

of the grant, reasonably made, across such lands, under the conditions described in the original opinion, is to enhance rather than to lessen their salable or rental value.' (Emphasis added.)"

Other courts have reached similar results. The New Jersey Court, in discussing what uses the State of New Jersey could make of lands "irrevocably devoted to the support of free public schools" by the Constitution of that State, made these observations in *Henderson v. Atlantic City*, 64 N.J. Eq. 583, 54 Atl. 533 (1903):

"'[The State] could probably grant a perpetual right to lay out streets or highways through it, *regarding the presence of such streets as likely to enhance the value of this property.* So, too, perhaps a privilege could be granted to a municipality to use it as a park *until such times as the State thought it to the benefit of the school fund to transmute the land into money by sale or lease.*" (Emphasis added.)

United States v. The Railroad Bridge Company, 6 McLean 517, Fed. Cas. No. 16,114 (N.D. Ill. 1855), was a case involving a right of way across public lands of the United States, which at one time had been reserved for military purposes. The opinion was written by Mr. Justice McLean, then an Associate Justice of the United States Supreme Court, who stated:

"In no point of view are these improvements prejudicial to the general interest; on the contrary, they greatly promote it. They encourage population, and *increase the value of land.* In no respect is the exercise of this power by the state inconsistent with a fair construction of the constitutional power of Congress over the public lands. It does not interfere with the disposition of the lands, and instead of lessening enhances their value." (Emphasis added.) (The foregoing language was cited in *Ross v. Trustees of University of Wyoming* (on rehearing), 31 Wyo. 464, 228 Pac. 642, 646 (1924))

The Supreme Court of Minnesota, in answer to a contention that a statute granting a right of way to railroad companies over school or university lands held by the State was repugnant to a provision in that State's Constitution forbidding the sale of such lands other than by public auction, stated in *Lawver v. Great Northern R. Co.*, 112 Minn. 46, 127 N.W. 431, 432 (1910):

"We doubt the soundness of this contention. The constitutional provision was intended to prevent the secret sale and possible sacrifice for an inadequate price of that portion of the public domain granted to the state for educational purposes. *The construction of the railroad across such lands would not only bring them into the market, but add materially to their market value.* The sale of a right of way by auction would necessarily be farcical or afford a means for preventing a public improvement. In interpreting a constitutional provision, a court is required to use common sense, and place upon it a practical construction, as fully as when construing a legislative enactment." (Emphasis added.)

In the instant case, as in the *Ross* case and other cases cited in the preceding footnote, the disposition of a given parcel without exacting specific compensation therefor could of course be held to deplete the trust fund—if only that single parcel were considered. But it does not follow that the value of the entire trust has in fact been diminished. The Arizona Court and other courts have held that there is no such diminishment, and that on that basis, the provisions of the Enabling Act have not been violated.

Petitioner places strong—though misguided—emphasis upon this Court's decision in *Ervien v. United States,* 251 U.S. 41, 40 S.Ct. 75 (1919), and the opinion of the Court of Appeals for the Eighth Circuit in the same case. *United States v. Ervien,* 246 Fed. 277 (8th Cir. 1917). *Ervien* was an action brought by the United States Attorney General to invalidate a New Mexico statute providing that 3% of the proceeds of all land sales should be used for the purpose of "making known the resources and advantages of this State generally. . . ."

The Respondent agrees with the United States that *Ervien v. United States* simply did not involve the same problem as this case. The key to the *Ervien* holding, as revealed by the Court of Appeals' opinion, is that while the trust lands comprised only about 1/26 of the area of the State, the proceeds of these lands were to be used for the benefit of the entire State. The opinion points out that the various trusts established by the Act are to be used for the benefit of the designated beneficiaries, and not the general public—the intended beneficiary under the challenged New Mexico statute. The soundness of this reasoning is as apparent as its inappositeness to the instant case. Even assuming that there would be any value increment resulting from advertising—an assumption which the opinion of this Court in the *Ervien* case questions—the New Mexico scheme still re-

quired that 1/26 of the lands of the State support an advertising program for the entire State.[9]

The problem with which the Arizona Court dealt was not how trust fund proceeds are to be utilized, but rather how the value of the land which will one day be converted into such funds is to be maintained. In resolving that issue, the Arizona Court followed the mandate of this Court and the Court of Appeals in the *Ervien* case that these lands and their proceeds not be regarded as general funds, but as particular funds for particular purposes. The value increment which the Arizona Court found was not an increment to State resources in general, but to the particular trust lands which the highways traversed.[10]

The real relevance of *Ervien v. United States* is that it demonstrates conclusively that where state practices are in fact in violation of the New Mexico or the Arizona Enabling Acts, the federal officer charged with enforcing these federal statutes—the

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[9]The Court of Appeals opinion states:

"Congress did not intend that the lands granted and confirmed should collectively constitute a general resource or asset like ordinary public lands held broadly in trust for the people, or that the proceeds should constitute a fund like moneys raised by taxation for 'general purposes.' Nevertheless, the state legislative act in question proceeds upon such a theory.

"If additional advertisements of the state at large and its resources are deemed advisable, the cost should come from available public funds, not from those of the trusts. The proposed campaign of publicity is for the general advancement of the state. It has no immediate or direct bearing upon the trust lands or purposes except as they are within and pertain to the state at large." 246 Fed. at 280.

[10]The Petitioner emphasizes dictum contained in one sentence of the Court of Appeals opinion stating that trust funds could not be used to construct highways throughout the State. This sentence must be read against the background of the discussion which preceded it, dealing with the fundamental problem of the case: utilization of moneys produced by 1/26 of the State's lands to benefit the entire State. The situation which the dictum envisioned involved the use of trust fund moneys to pay the actual cost of construction of highways throughout the State.

United States Attorney General—has taken the necessary corrective action.

2. Interpretation by the United States Attorney General

Primarily responsibility for enforcing the trust provisions of the Enabling Act, and assuring the vindication of the federal policy contained therein, is vested in the United States Attorney General.[11] The Act further provides that its designation of the Attorney General as the enforcement authority shall not be taken "as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act."[12] Thus, two governmental bodies are charged with the responsibility of enforcing the trust provisions of the Act: the United States Attorney General and the State of Arizona. Significantly, the interpretations of both the Attorney General and the State of Arizona—implicit in one case and explicit in the other—have been the same.[13]

The practice presently under attack by the Petitioner is of more than fifty years standing in the State of Arizona. *State v. Lassen,* 99 Ariz. 161, 162, 407 P.2d 747 (1965). During this more than one-half century, the Attorney General has never taken steps to prevent the practice as violative of federal policy contained in the Enabling Act.

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[11]"It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its court, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom." Arizona Enabling Act, Section 28.

[12]*Ibid.*

[13]According to S. Rep. No. 454, 61st Cong., 2d Sess. (1910) the provision for enforcement by the Attorney General was the most important difference between the House and Senate versions of the Act. That report states: "The Senate bill, while somewhat more specific, is not notable for any marked innovation unless it be found in the express provision for its enforcement by the action of the Attorney General." (*Id.* at p.19.)

This acquiescence has not been through inadvertence. In those instances in which practices occurred which decreased the value either of the trust lands, or the funds resulting from disposition of these lands, the Attorney General has been quick to act. Prior to enactment of the Enabling Act, there had been violations of similar trust land restrictions placed upon the territory of New Mexico by a grant of lands to that territory. Twelve lawsuits, known as the "tall timber" cases, referred to above, resulted from these violations; all of the suits were brought by the United States Attorney General's Office. S. Rep. No. 454, 61st Cong., 2d Sess., p. 34 *et seq.*

In 1915 the State of New Mexico enacted a statute providing that funds resulting from the sale of trust lands should be used to advertise the resources and advantages of the State of New Mexico. The United States Attorney General's Office was successful in having this statute invalidated as repugnant to the New Mexico Enabling Act. *Ervien v. United States,* 251 U.S. 41, 40 S.Ct. 75 (1919).

The action of the Attorney General in *Ervien v. United States* was swift and decisive. Yet at the very time that the *Ervien* litigation was taking place, Arizona was utilizing portions of its trust lands for the construction of highways, and the Department of Justice made no move to prevent it. *State v. Lassen,* 99 Ariz. 161, 162, 407 P.2d 747 (1965).

Any doubt which might have remained as to the United States Attorney General's position in this matter was certainly dispelled by litigation which was instituted in 1962 by the Petitioner in the Federal District Court for the District of Arizona, in an attempt to secure the same judicial determination which the Petitioner seeks here. *State of Arizona, Trustee, ex rel State Land Department v. State of Arizona,* Civil Case No. 4517 Phx., filed in United States District Court for the District of Arizona, December 3, 1962.[14] Named as defendants in that case were

the Arizona State Highway Department, the State Highway Commission, the State Highway Director and the United States of America. The reason for joining the United States as a defendant was set forth in paragraph IV of the Complaint, which stated as follows:

> "The United States of America is made a party as grantor of the lands involved and for the reason that under the provisions of Section 28 of the Enabling Act of Arizona, supra, the United States placed conditions and restrictions upon the State in respect to the sale, lease, conveyance, contracts of or concerning the lands granted or confirmed or the use thereof or the natural products thereof and upon any money or thing of value derived therefrom and further made it the duty of The Attorney General of the United States to prosecute in the name of the United States and in its Courts, such proceedings at law, or in equity, as may from time to time be necessary and appropriate to enforce the provisions of the Enabling Act relative to the application and disposition of the lands so granted and confirmed and the products thereof and the funds derived therefrom."

The United States Attorney General filed a Motion to Dismiss on behalf of the United States. One of the memoranda in support of the Motion to Dismiss argued, *inter alia,* that "the relief sought by the Complaint in this action (that the Attorney General, in his official capacity, enforce the provisions of the Act) is relief in the nature of mandamus" and that only the United States District Court for the District of Columbia had jurisdiction to grant such relief. The Complaint and the memorandum filed by the United States in which the foregoing language appears are set forth in the Appendix to this Brief.

Thus, the Attorney General is not only aware of his responsibilities under the Act; he has formally opposed efforts by this Petitioner to force his Department to take the Petitioner's side

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[14]We respectfully request that this Court take judicial notice of this United States District Court case, and all pleadings and documents filed therein. *Brown v. Board of Education,* 344 U.S. 1, 73 S.Ct. 1 (1952).

in this dispute. The fact that he has opposed these efforts compels the conclusion that the Attorney General has not regarded Arizona to be in violation of its Enabling Act.[15]

It is well settled doctrine that interpretations placed upon a federal statute by the federal agency charged with the responsibility of its enforcement is entitled to great weight in determining the meaning of the statute. As this Court reaffirmed in *Udall v. Tallman*, 380 U.S. 1, 23, 85 S.Ct. 792, 805 (1965), " 'To sustain the [agency's] application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' "

In some cases—such as here—the agency's agreement with an existing interpretation can only take the form of acquiescience through non-imposition of available sanctions. This Court has held that ". . . just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant. . . ." *Federal Trade Commission v. Bunte Brothers*, 312 U.S. 349, 352, 61 S.Ct. 580, 582 (1941).

The striking fact about the Attorney General's interpretation in this case is that it is of more than 50 years standing. Interpretations with such history behind them are "persuasively determinative of [the statute's] construction." *United States v. State of Minnesota*, 270 U.S. 181, 205, 46 S.Ct. 298, 305 (1926). See also *United States v. State of Wyoming*, 331 U.S. 440, 67 S.Ct. 1319 (1947); *California v. Desert Water Oil & Irrigation Co.*, 243 U.S. 415, 37 S. Ct. 394 (1917); *Border Line Transp. v. Haas*,

[15] In its Brief before this Court, the Department of Justice takes only a slightly different position from that of the Arizona Supreme Court. This position will be discussed under Section III of this Brief; it can be best appreciated, however, against the background of what the Department has done over the past fifty years.

128 F.2d 192 (9th Cir. 1943), *cert. denied* 318 U.S. 763, 63 S.Ct. 662 (1943).

3. *State Discretion in Interpreting and Implementing State Enabling Acts*

Interpreting Arizona's Enabling Act as not conferring upon the State the discretion of selection among possible reasonable means of satisfying the value requirements of the Act might raise serious constitutional questions. This Court has held that the doctrine of equality of states requires that each state admitted subsequent to the original 13 states be entitled to a broad range of permissible activity in implementing its own Enabling Act. *Coyle v. Smith,* 221 U.S. 559, 31 S.Ct. 688 (1911); *Pollard v. Hagan,* 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845); *Escanaba & Lake Michigan Transp. Co. v. City of Chicago,* 107 U.S. 678, 2 S.Ct. 185 (1883).

The general principle is illustrated by *Coyle v. Smith, supra.* On June 16, 1906, Congress passed the Enabling Act for the State of Oklahoma 34 Stat. 267 (1906). One of the provisions of Section 2 of that Act was that "the capital of said state shall temporarily be at the City of Guthrie . . . and shall not be changed therefrom previous to Anno Domini nineteen hundred and thirteen. . . ." 31 S.Ct. at 689. On December 29, 1910, the State of Oklahoma passed an Act providing for the immediate relocation of the State capital at Oklahoma City. Litigation ensued challenging the validity of the 1910 Act. This Court held that notwithstanding its obvious repugnance to the provisions of the Enabling Act, the Oklahoma statute was valid, on the ground that to deprive Oklahoma of the right to determine such matters as the location of its state capital would violate the constitutional doctrine that all states must be admitted by Congress on an equal footing with the original 13 states.

This is not to suggest that under the mantle of *Coyle v. Smith* Arizona could completely dispense with the value requirement of its Enabling Act. The Petitioner is correct in contending that

such requirements are properly imposed as incident to the disposition of public lands.

The significance of *Coyle v. Smith* is, rather, the leeway which it implies in the states in dealing with enabling act provisions which are particularly within the ambit of state responsibility and expertise.

Starting from the *Coyle v. Smith* premise that a state may completely turn its back on certain types of restrictions which relate exclusively to state problem areas, it follows *a fortiori* that it is within the state's power to select from various reasonable interpretations which a given enabling act provision permits, that particular interpretation which in the state's view best fulfills the policy of the provision.

If the State of Oklahoma may flatly overrule the Congressional mandate in its Enabling Act that the state capital remain in Guthrie until 1913, Arizona may hold that value includes value to trust lands as a whole, and is not restricted to requiring specific dollars for each square foot of land in which any rights are granted at the time such rights are granted.

Even if not required by constitutional doctrine, the interpretation and implementation of enabling acts by the individual states so long as reasonably consistent with the Acts' requirements would be indicated as a matter of sound policy. The function of enabling acts is to establish the new state on an equal footing with its sister states and to mark out broad general policy guide lines for the state to follow. Since Congress cannot at the time of passage of an enabling act foresee all of the possible problems which may arise, most restrictions must necessarily be set forth as broad general principles. Once these guide lines are established, the implementation of the general policy within the bounds set by the guide lines should be left to the states themselves.

This is particularly true where the basic problems fall within

areas over which the state itself has either primary or exclusive responsibility. The provision of schools, insane asylums, miners' hospitals, institutions for the blind, and similar institutions in the State of Arizona are the responsibility of the State of Arizona. Setting the standards according to which these institutions are to be operated and determining the total amount of money to be used therefor are similarly the state's responsibility. To whatever extent the trust funds are not sufficient to support these institutions according to standards which are set by the state, it is the state which must provide the difference through tax-raised funds.

Moreover, the legislature and the courts of the state are in the best position to determine under what circumstances value has been obtained, and how the value requirements of the Act can be most effectively administered. It is clearly within the power of Congress to provide in a state enabling act that certain lands conveyed to the state be held in trust; that the lands and their proceeds be devoted to help defray designated state expenses; and that the lands not be disposed of except for value. Equally clearly, selection of the particular means of carrying out the policies of the enabling act—in this case determining under what circumstances value has been obtained—can be most effectively accomplished by the state itself, acting through its various departments of government.[16]

For these same reasons, the conflict between the holding in this case and the New Mexico Supreme Court decision in *State ex rel State Highway Comm'n v. Walker,* 61 N.M. 379, 301 P.2d 317 (1956), is more conceptual than real. Although the Enabling Act provisions of the two states are practically the same, there is nothing inconsistent in New Mexico's interpreting its Act more narrowly than Arizona. The only relevant question for

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[16]The Petitioner correctly observes that enabling acts, once passed, are more difficult to amend than other Congressional legislation. This is an additional reason why such acts should not be narrowly construed.

purposes of this case is whether the Arizona interpretation is a reasonable and therefore permissible one.

4. *Congress and the Alaska Enabling Act: The Verdict of a Half-Century's Experience*

We agree with Petitioner that subsequent Congressional legislation is not determinative as to the meaning of what was done in 1910. However, neither is it necessarily irrelevant. If Congress had felt—based upon what actual experience revealed during the fifty years between the admission of Arizona and the admission of Alaska—that the Arizona Act, as interpreted, was too lax, it is logical to assume that more stringent, or at least more specific, limitations would have been imposed upon the new State of Alaska. Instead, Congress gave to Alaska the right to claim outright, with no restrictions whatever, 102,550,000 acres—more than one-third more land than is contained in the entire State of Arizona.[17] The Alaska Act does not repeal the trust provisions of the Arizona Act. It does provide additional evidence that Arizona and other states with public trust lands have not abused their trust and that Arizona's interpretation of its Enabling Act—that value is to be determined from the standpoint of all trust lands, and not just the particular parcels taken—is a permissible interpretation.

III. *The Position of the United States Attorney General Before This Court*

The United States, as *amicus curiae* before this Court, agrees with the Respondent and the Arizona Supreme Court on the broad issue, that Arizona may utilize trust lands for highway purposes so long as the total value of the trust is not thereby diminished.

The sole point of departure therefore, between the United

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[17]Section 6 (b), Alaska Admission Act, 72 Stat. 339, 340 (1958). Additional lands are also conveyed, subject to minimal restrictions. Section 6 (a), *supra*. Arizona's total land area is 72,688,000 acres. See *1965 Public Land Statistics*, p. 11, published by United States Department of the Interior, Bureau of Land Management.

States on the one hand, and the Respondent and the Arizona Supreme Court on the other, is: upon whom does the burden fall of showing whether in fact the devotion of trust lands to highway purposes does or does not result in a preservation or enhancement of the trust corpus. Alternatively, the issue is whether the holding of the Arizona Supreme Court that in fact the trust does not diminish in value as a result of highway construction across portions of the trust lands is entitled to any weight at all, or whether it may simply be rejected out of hand as though it never existed.

We submit that at the very least, the Arizona Supreme Court's determination is entitled not to be rejected without being disproven. Our reasons are two:

A. The determination of factual questions such as these falls within the scope of the discretion vested in the State by the Enabling Act.

B. The Arizona Court's decision is consistent with the only systematic studies which have been conducted on this problem in general, and also with other evidence which the Arizona Supreme Court could have taken into consideration.

A. *State Discretion and Questions of Fact*

Everyone concerned in this matter, including the United States, agrees that the State must be given leeway in interpreting and implementing the trust provisions of its Enabling Act, so long as such implementation is in substantial conformity with the trust provisions. But having recognized that doctrine, and under its aegis having agreed that the public auction provisions do not apply to public lands for highway purposes, the United States would ignore the force of the doctrine as it applies to the resolution of issues of fact. If the Enabling Act permits the State to hold the public auction provisions inapplicable to highway uses and to consider value from the standpoint of the entire bundle of trust lands—and clearly it does—then it would seem to follow *a fortiori* that the courts of the State must be

permitted to ascertain whether in fact there has been a value enhancement.[18]

The United States characterizes the Arizona Court's determination as a "blanket presumption" and argues that surely there must be some state highway projects as to which, considered in isolation from all other parts of the state highway construction program, the value of the lands taken is greater than the resulting value enhancement. Assuming *arguendo* that this may be true, the premise of the argument is at odds with the fundamental view—shared by the United States—that in determining value, the effect of a given state program on *all* state trust lands must be taken into consideration.

The Arizona State Highway construction program is a statewide program. It is no more consistent to restrict the consideration of value return to a single taking or a single section than it is to restrict it to the few acres within a section which are actually taken. Therefore, even if there are individual projects as to which, considered in isolation, there is no net benefit, the State is entitled to offset against these the value enhancement resulting from other highway construction projects. The holding of the Arizona Supreme Court is simply that the utilization by the Highway Department of small portions of trust lands for the construction of highways in various parts of the State does not result in a net dimunition to the value of the entire trust; this holding satisfies perfectly the requirement that trust

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[18]Normally, such a factual determination would be subject to review by this Court. This is not possible in the instant case, because of the peculiar way in which the case arose. As noted earlier, the factual determination on which the holding of the lower court rests was not made in this case. Because of the Petitioner's failure to present any evidence of any kind to show that the Court's earlier determinations are in fact inapplicable in light of present circumstances, the Court had no alternative but to affirm those former determinations. The opportunity still exists, however, for the Petitioner to disprove the factual basis of the Arizona Court's decision if he lays the proper groundwork.

lands be utilized for public purposes only where the total value of the trust is not lessened by such use.

B. *Facts Subject to Judicial Notice Consistent with the Lower Court's Factual Holding*

It is not possible to ascertain from this record the considerations which entered into the Court's factual determination. The determination is consistent, however, with facts which the Court could have taken into account. Studies have been conducted in other states concerning the effect of the construction of highways upon nearby property values. These studies have been summarized by Mr. Edward Sprague, former research analyst with the Department of Governmental and Economic Research of the New Jersey State Chamber of Commerce, as reflecting "overwhelming evidence that properly designed highways tend to increase the total property values of the areas served and thereby increase the local tax rateables. . . ."[19]

The most comprehensive studies are two which have been conducted in the State of Texas. The first, conducted on a 5.4 mile stretch of the Dallas Central Expressway in 1956 and 1957, included unimproved land and areas zoned for commercial, manufacturing, and residential uses. The study compared changes in land values near the expressway before and after its construction with changes in value of equivalent lands located far enough from the expressway that they would not be effected by it. Lands near the expressway were divided into three bands, the first band consisting of property abutting on the frontage roads, the second consisting of property located within two blocks of the frontage roads, and the third extending to property four blocks from the frontage roads.

All types of property in the study section showed greater value increases than comparable lands in the control areas, but

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[19]Sprague, *The New Highways and Property Values,* THE HIGHWAY AND THE LANDSCAPE, 147 (Snow Ed. 1959).

the comparative increases in areas zoned for residential uses were less than the others.[20] Mr. Sprague concluded:

> "Measured in terms of relative increases in land prices, the total benefits in the study section, within the first ten years following construction, were estimated at $20 million to $24 million, against a total construction cost of $13 million." [21]

The second study was conducted along a 7.8 mile stretch of the Gulf Freeway running from a downtown area of Houston through the residential outskirts. The results were similar to those reflected by the Dallas study:

> "Again it was shown that land immediately adjacent or in close proximity to the highway increased considerably more in value, as measured by sales of real property, than similar parcels of land in other parts of the city away from the

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[20] *Id.* at 149. The comparative increases in land prices and tax valuations according to proximity to the expressway are shown by the following table prepared by Mr. Sprague:

EFFECTS OF THE DALLAS CENTRAL EXPRESSWAY ON NEARBY LAND PRICES AND LAND TAX VALUATIONS

Location of Study Areas	*Per Cent Increase in Study Areas Minus Per Cent Increase in Control Areas*	
	Land Prices 1946–1955	*Land Tax Valuations 1945–1955*
Band A Properties Abutting on Frontage Roads	563	304
Band B Properties Within Two Blocks of Band A	64	42
Band C Properties Within Two Blocks of Band B	84	18

Id. at 150.

Although not directly relevant, the increase in land tax valuations emphasizes that highway construction also benefits state institutions such as the beneficiaries of the Arizona Enabling Act trusts by increasing the total tax bases from which these institutions derive most of their financial support.

[21] *Ibid.*

freeway. In fact, in the ten years following the start of construction (1946), the value of real estate abutting on the freeway increased more than twice as fast as in the control areas. As was the case in Dallas, commercial and undeveloped areas benefited the most."[22]

Systematic studies such as discussed above have not been conducted in the State of Arizona. However, tourism in Arizona has grown to the point that it provides the State's fourth largest source of income,[23] and Arizona historians recognize the important role that roads and highways have had in the development of the State's economy and the value of its lands.[24]

While there is not any evidence on this record specifically pointing to the correctness of the Arizona Supreme Court's decision, neither is there any evidence to dispute it. Members of the Arizona Supreme Court, whose roots are deep in the State and its history, who are elected by the people of the State of Arizona, and who are familiar with the conditions and the problems of Arizona, are qualified to make a judgment as to the rela-

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[22] *Id.* at 151. The Gulf Freeway study also showed that during a five year period prior to the public's realization that the freeway would be built, the increase in market value of lands adjacent to its future route was about the same as the median of increases in the control areas. After knowledge of the proposed freeway became general, properties adjacent or close to the facility increased to a greater extent than in any other section of the city. See *The Impact of Highways on Land Uses and Property Values* 26, 28 (1958), published by the Highway Traffic Safety Center and College of Business and Public Service, Michigan State University.

In addition to the Texas studies, Mr. Sprague discusses studies in California, New York, New Jersey and Massachusetts concerning the effect of highways on surrounding land values.

The New York, New Jersey, and Massachusetts studies disclosed results similar to those of the Texas studies. The California study was less conclusive—perhaps because only residential properties were involved—but not inconsistent with Mr. Sprague's general statement that the evidence is overwhelming that properly designed highways tend to increase nearby property values.

[23] II Peplow, HISTORY OF ARIZONA 343 (1958).

[24] *Id* at Chap. XX "Transportation and Tourism." See especially 389-97.

tionship between Arizona's highways and its land values, and the effect of highway construction on the value of large parcels of trust lands which these highways traverse. In light of the studies conducted in other states, particularly the State of Texas, Arizona's southwestern neighbor, and in light of the role which historians have assigned to highways in the development of Arizona, it is certainly not an unreasonable determination. At the very least, it should not be overturned by fiat, without any proof whatsoever that it is wrong. The long-standing nature of the determination, the acceptance which it has enjoyed over the years by the United States Attorney General, and the broad discretion that the State of Arizona enjoys in interpreting its own Enabling Act, require at least that the factual underpinning of the Arizona Court's holding not be set aside on a record which contains absolutely no evidence inconsistent with that holding.

CONCLUSION

The Arizona Enabling Act is a Congressional statute. However, it is a statute which is peculiarily pointed toward State rather than national affairs, and which set policy guide lines not for the nation as a whole but for the State of Arizona and its particular internal problems.

Congress has vested the State of Arizona with substantial latitude in administering its trust lands and in implementing the trust land provisions of its own Enabling Act. The wisdom of this Congressional judgment is particularly apparent in the context of problems which lie within the exclusive realm of state responsibility. Such problems as whether payments should be made by one agency of the State of Arizona to another agency of the State of Arizona, and whether schools and other state institutions shall be maintained according to the standards set by the State of Arizona from one fund or another, are matters which should be left to the Arizona courts and Legislature, so long as the action taken is reasonably consistent with the purpose

and provisions of the Enabling Act. For reasons discussed above, it is respectfully submitted that the holding of the Arizona Supreme Court meets this test, and should therefore be affirmed.

Respectfully submitted,

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APPENDIX

Complaint and Government's Reply to Memorandum in Opposition to Government's Motion to Dismiss in *State v. Arizona, Trustee ex rel State Land Department of State of Arizona, Through its Arizona Highway, et al.*, No. Civ. 4517-Phx.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA, TRUSTEE, ex rel, STATE LAND DEPARTMENT by OBED M. LASSEN, STATE LAND COMMISSIONER, Plaintiffs, vs. STATE OF ARIZONA, through its ARIZONA HIGHWAY DEPARTMENT; ARIZONA STATE HIGHWAY COMMISSION; JUSTIN HERMAN, State Highway Director; and the UNITED STATES OF AMERICA, Defendants.	CIVIL ACTION No. 4517 COMPLAINT IN DECLARATORY JUDGMENT

Plaintiffs for their complaint for Declaratory Judgment, allege as follows:

I.

That the State of Arizona is a sovereign State of the United States of America.

The State Land Department is a department of the State of Arizona charged with administration of all laws relating to lands owned by, belonging to and under the control of the State with power in the name of the State to commence, prosecute and defend all actions and proceedings to protect the inter-

est of the State in lands within the State or the proceeds thereof.

Obed M. Lassen is the duly appointed, qualified and acting State Land Commissioner of the State of Arizona, with powers co-extensive with the powers of the State Land Department and is the Executive Officer of the State Land Department.

The Arizona Highway Department, control of which is vested in the Arizona State Highway Commission, is a department of the State of Arizona with jurisdiction and duties as set forth in Title 18, Chapter 1, Arizona Revised Statutes.

Justin Herman is the duly appointed, qualified and acting Chief Executive and Administrative Officer of the Arizona State Highway Department.

II.

This action is brought under authority of the Judiciary Act, 28 U.S.C., Section 1331, wherein the matter in controversy exceeds the sum of $10,000.00, exclusive of interests and costs and arises under a law of the United States, to wit: the Enabling Act of the State of Arizona, Act of June 20, 1910, c. 310, 36 U.S. Stat. 557, 568-579, as amended June 5, 1936, c. 517, 49 Stat. 1477; June 2, 1951, c. 120, 65 Stat. 51.

III.

This action is further brought pursuant to the Declaratory Judgment Act, 28 U.S.C., Section 2201, to determine tht rights, status and legal obligations of the State of Arizona, as trustee of school and institutional lands granted and confirmed to the State of Arizona under the Enabling Act of the State of Arizona, Supra.

IV.

The United States of America is made a party as grantor of the lands involved and for the reason that under the provisions of Section 28 of the Enabling Act of Arizona, Supra, the United States placed conditions and restrictions upon the State in respect

to the sale, lease, conveyance, contracts of or concerning the lands granted or confirmed or the use thereof or the natural products there of and upon any money or thing of value derived therefrom and further made it the duty of The Attorney General of the United States to prosecute in the name of the United States and in its Courts, such proceedings at law, or in equity, as may from time to time be necessary and appropriate to enforce the provisions of the Enabling Act relative to the application and disposition of the lands so granted and confirmed and the products thereof and the funds derived therefrom.

V.

That since statehood, the Arizona Highway Department, having administrative management and control of the location, construction, operation and maintenance of the public roads of this State, designated as state highways, has obtained the necessary easements and rights-of-way therefor, together with the necessary sand, gravel and base materials for the construction thereof from the school and institutional lands under the jurisdiction of the State Land Department without cost to the State Highway Department and without compensation in money or otherwise to the trust created by the Enabling Act.

VI.

In recent months, numerous applications have been made by the State Highway Department to the State Land Department for the use of school and institutional lands under the jurisdiction of the State Land Department for rights-of-way and material pits for highways; the State Land Department refused to grant such rights-of-way and material pits unless and until the Arizona Highway Department tendered and paid to the State Land Department such sums as the State Land Department determined and assessed for such use; that in order not to interfere with national security and preparedness by stopping or delaying the construction of interstate highways through Arizona, the State

Land Department has granted to the Arizona Highway Department, since on or about October 15, 1960, without charge, for rights-of-way in excess of 3,000.00 acres and for material pits in excess of 3,000.00 acres; the reasonable value thereof being in excess of $1,000,00.00, resulting in a loss to the trust beneficiaries in excess of $1,000,000.00; that the Arizona Highway Department has, in times past, obtained the use of school and institutional lands from the Arizona State Land Department for the purpose of maintenance camps, radio transmitters and repeater stations on payment of a nominal sum only, not based upon an appraisal of the true value of the interest.

VII.

That the Enabling Act of the State of Arizona, Act of June 20, 1910, c. 310, 36 U.S. Stat. 557, 568-579, as amended June 5, 1936, c. 517, 49 Stat. 1477; June 2, 1951, c. 120, 65 Stat. 51, after granting certain lands to the State for the support of common schools and other designated purposes, provides in part as follows:

"Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

. . . . . Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie,

notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. . . . . .

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . . . .

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No money shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. . . . . .

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding. . . . . ."

VIII.

That the New Mexico Enabling Act, likewise being Act of June 20, 1910, c. 310, 36 U.S. Stat. 557, Section 10, contains provisions substantially identical with the hereinabove quoted portions of Section 28 of the Arizona Enabling Act.

IX.

That the Arizona Supreme Court has ruled that the Arizona State Highway Department is not required to pay for material sites and rights-of-way on, over or across school and institutional lands, *State ex rel Conway vs. State Land Department (1945)*, 62 Arizona 248; 156 Pac.2d 901.

X.

That the Supreme Court of the State of New Mexico under substantially identical Enabling Act provisions has ruled that the State Highway Department is required to pay for material sites and rights-of-way, on, over or across school and institutional lands, *State ex rel, State Highway Commission vs. E. S. Walker (1956)*; 61 New Mexico 374; 301 Pac.2d 317.

XI.

That the plaintiff, as a trustee, is jeopardized in the administration of the trust by conflicting decisions of State Courts, including the highest Courts of the State of Arizona and New Mexico and is unable to determine the duties of the trustee; that the plaintiff is in danger of a determination by the United States Attorney General that the duties of the trustee are not being properly carried out and would be subject to an action brought by the United States to enforce the terms of the trust; that the plaintiff is in great doubt as to whether or not it should continue to act in accordance with the case law of the State of Arizona and to continue to grant, without payment of compensation, rights, privileges and conveyances to the State of Arizona or its political subdivisions.

XII.

That an actual controversy exists between the State Land Department and the State Highway Department, the State Land Department alleging and the State Highway Department denying the following, to-wit:

(a) The Arizona Highway Department has no lawful right to the use of said school and institutional lands for state highway rights-of-way and to the use of dirt, sand, gravel and base materials from said lands for the construction of highways without payment of money compensation therefor to the State Land Department.

(b) That Section 28 of the Enabling Act prohibits the use of school and institutional lands for rights-of-way for highways without payment of money compensation therefor.

(c) That Section 28 of the Enabling Act prohibits the use of dirt, sand, gravel and base materials from school and institutional lands for state highway construction without the payment of money compensation therefor.

(d) That though there is no minimum price fixed by law for the use of State lands for rights-of-way for highway, or for dirt, sand, gravel and base materials for the construction of said highways, Section 28 of the Enabling Act requires the payment of money compensation therefor.

(e) That when the Arizona Highway Department has made a reasonable determination that a portion of the unoccupied school and institutional lands are necessary for a right-of-way for state highways, or that certain dirt, sand, gravel and base materials are necessary for the construction of a highway, the State Land Department has a lawful right to deny the Arizona Highway Department use for such purpose or to withhold the use upon the condition of payment of money compensation.

WHEREFORE, plaintiff prays.

1. That this honorable court enter a Judgment and declaration that the State Highway Department, the State Highway Commission and Justin Herman have no right to the use, conveyance, benefits or privileges in the lands granted to the State of Arizona under the Enabling Act for rights-of-way or any other purposes, nor the right to use dirt, sand, gravel, or other products

therefrom until they shall have executed the appropriate applications for necessary conveyance and paid or tendered unto the plaintiff adequate compensation therefor as determined by plaintiff in the manner required by the Enabling Act, a United States Statute, and for a further determination and adjudication as to the terms and conditions under which the Enabling Act will be properly enforced and adjudicating that the trust is or is not being properly administered in accordance with the interpretation placed thereon by the Court and by the United States as its grantor.

2. For a second and further determination that prior to the granting of any rights-of-way or the right to make use of the products of the state land and the materials thereof that the defendants, Arizona Highway Department, shall be required to make due and proper application to the plaintiff, as trustee, under the terms of this trust and under the laws and statutes of the State of Arizona and the Enabling Act, and to submit to acquiring lands or the use thereof or the natural products thereof in the manner set forth and subject to conditions contained in the Enabling Act.

DATED this 30th day of November, 1962.

ROBERT W. PICKRELL
The Attorney General
s/ Charles C. Royall
CHARLES C. ROYALL
Assistant Attorney General
Attorneys for Plaintiffs
159 Capitol Building
Phoenix 7, Arizona

STATE OF ARIZONA)
) SS.
County of Maricopa)

OBED M. LASSEN, being first duly sworn on oath, deposes and says:

I am the duly appointed and qualified acting State Land Commissioner and I have read the foregoing Complaint in Declaratory Judgment and know the contents thereof and that the same is true to my own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true.

s/Obed M. Lassen
OBED M. LASSEN
State Land Commissioner

Subscribed and sworn to before me this 30th day of November, 1962.

Yvonne D. Argenziano
Notary Public
My Commission Expires Sept. 24, 1966.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA, TRUSTEE ex rel, STATE LAND DEPARTMENT by OBED M. LASSEN, STATE LAND COMMISSIONER,

Plaintiffs,

vs.

STATE OF ARIZONA, through its ARIZONA HIGHWAY DEPARTMENT; ARIZONA STATE HIGHWAY COMMISSION; JUSTIN HERMAN, State Highway Director; and the UNITED STATES OF AMERICA,

Defendants.

NO. CIV. 4517-PHX. Government's Reply to Memorandum In Opposition

STATEMENT

This action was filed in December, 1962 to obtain a determination of the rights and obligations of the State of Arizona as trustee of school and institutional lands which, together with lands for other purposes, were granted to the State under the Enabling Act of New Mexico and Arizona, Act of June 20, 1910, c. 310, 36 Stat. 577, as amended by the Act of June 5, 1936, c. 517, 49 Stat. 1477, and the Act of June 2, 1951, c. 120, 65 Stat. 51.

The next to last paragraph of Section 28 of the Enabling Act with respect to Arizona names the Attorney General of the United States as the official to enforce the provisions of the Act relating to the use and disposition of lands. For this reason the plaintiff has brought this action in the Federal District Court naming the United States as a party defendant and not the Attorney General.

ARGUMENT

The United States Attorney has filed this motion to dismiss the action as to the United States on the ground that under the statutes relied upon by the State, including the Enabling Act, the government has not consented to be sued in an action of this nature and for that reason the Court lacks jurisdiction.

The United States, as sovereign, is immune from suit save as it consents to be sued. Since waivers of sovereign immunity are to be strictly construed, the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941).

We find nothing in the Enabling Act which even suggests a waiver of immunity. The duty imposed on the Attorney General is one of enforcement; prosecution thereunder is left to his discretion. Moreover, a suit against the Attorney General, if one can be brought at all, definitely could not be maintained in Arizona in the circumstances here involved, his official residence being Washington, D. C. *McCartney* v. *Hoover*, 151 F.2d 694 (C.A. 7, 1945); *Nesbitt Fruit Products Co.* v. *Wallace*, 17 F. Supp. 141. It is also to be noted that the Act gives the State or any of its citizens the same power of enforcement as that vested in the Attorney General. (See last paragraph of Section 28). This would indicate that neither the Attorney General nor the United States is an indispensable party to any action to enforce the trust.

Furthermore, the relief sought by the complaint in this action (that the Attorney General, in his official capacity, enforce the provisions of the Act) is relief in the nature of mandamus. An action seeking such affirmative relief is a suit against the government which cannot be maintained as the United States has not consented to be sued in the Courts with respect thereto and also because the district courts are without power to grant writs of mandamus. *Updegraff* v. *Talbott*, 221 F. 2d 342 (C.A. 4,

1955). The only United States District Court having original jurisdiction to grant relief in the nature of mandamus is the United States District Court for the District of Columbia. *Kendall* vs. *United States,* 12 Pet 524, 618, 9 L. Ed. 1181; *Updegraff* v. *Talbott,* supra. Consequently, this type of suit cannot be brought in this District and, therefore, the Court lacks jurisdiction.

In connection with the Tucker Act, 28 U.S.C.A., Sec. 1346(a)(2) which plaintiff cites as additional authority for this action, the Supreme Court in the *Sherwood* case, supra, held that the concurrent jurisdiction of the District Court under the Tucker Act does not extend to any suit which could not be maintained in the Court of Claims. Since plaintiff's suit does not seek money damages from the United States and is not predicated on a breach of contract, it is clear that it could not be litigated in the Court of Claims, and, therefore cannot be maintained in the District Court.

For the reasons stated above this Court is without jurisdiction as to the United States of America and should grant its motion to dismiss.

Respectfully submitted,
C. A. MUECKE
United States Attorney
ARTHUR E. ROSS
Assistant U. S. Attorney

I certify that one copy of the foregoing was mailed on June 17, 1963 to:

State of Arizona
Attn: Charles C. Royall
Assistant Attorney General
159 Capitol Building
Phoenix 7, Arizona
Attorneys for Plaintiffs

ARTHUR E. ROSS
Assistant U. S. Attorney